139

(2)

No. 09-146

Supreme Court, U.S.
SEP 3 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LENNON ANDERSON,

Petitioner,

v.

VANGUARD CAR RENTAL USA INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

ALAN D. DANZ
AMY L. KRONENGOLD
ARIANNE B. SUAREZ*
LIEBERMAN DANZ
& KRONENGOLD, PL
1301 International Parkway
Suite 140
Fort Lauderdale, FL 33323
(954) 385-5400

* *Counsel of Record* *Counsel for Respondent*

524987

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit's *per curiam* Opinion affirming the District Court's dismissal with prejudice of Petitioner's civil action pursuant to Federal Rules of Civil Procedure 12(b)(6) does not conflict with a decision of this Court or a Court of Appeals, and does not amount to a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit's *per curiam* Opinion affirming the District Court's dismissal with prejudice of Petitioner's civil action pursuant to Federal Rules of Civil Procedure 12(b)(6) where the Eleventh Circuit's ruling does not implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Vanguard Car Rental USA Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Constitutional Provisions and Statutes Involved in the Case	1
Introduction	2
Counter-Statement of the Case	4
Reasons for Denying the Petition	9
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Arnold v. Board of Education of Escambia County, Alabama, 880 F.2d 305 (11th Cir. 1989) 12, 13

Chapman v. AI Transport, 229 F.3d 1012 (11th Cir. 2000) 11, 12

D.P. ex. Rel.E.P. v. Sch. Bd. of Broward County, 483 F.3d 725 (11th Cir. 2007) 9

Garfield v. NDC Health Corp., 466 F.3d 1255 (11th Cir. 2001) 11

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) 13

Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992) 10

Scheuer v. Rhodes, 94 S.Ct. 1683, 416 U.S. 232 (1974) 9

Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp., 208 F.3d 1308 (11th Cir. 2000) 9

Cited Authorities

Page

Trawinski v. United Tech.,
313 F.3d 1295 (11th Cir. 2002) 9, 10

Wagner v. Daewoo Heavy Industries America Corp.,
298 F.3d 1228 (11th Cir. 2002) 12

Wagner v. Daewoo Heavy Industries America Corp.,
289 F.3d 1268 (11th Cir. 2002) 12

Statutes and Constitutional Amendments

Florida Statute § 772.103(3) 5

Florida Statute § 772.103(4) 5

18 U.S.C. § 1584 4

42 U.S.C. § 1985(3) ..... *passim*

42 U.S.C. § 1994 4

Fifth Amendment 5, 7

Thirteenth Amendment 2, 5, 7, 8

Rules

FRCP 12(b)(6) ..... *passim*

U.S. Sup. Ct. R. 10 ..... 2, 9

CONSTITIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Federal Rules of Civil Procedure, Rule 12(b)(6)

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

42 U.S.C. § 1985(3)

(text of provision set forth in Petition for Writ of *Certiorari*)

Thirteenth Amendment

(text of provision set forth in Petition for Writ of *Certiorari*)

INTRODUCTION

Petitioner has presented no "compelling reasons" for his Petition for a Writ of *Certiorari* ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Eleventh Circuit's December 23, 2008 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals, that the Opinion is a departure from the accepted and usual course of judicial proceedings, or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c).

The subject of this Petition is the Opinion which affirmed the dismissal with prejudice of Petitioner's civil action against Respondent. The United States District Court for the Southern District of Florida, by Order dated February 29, 2008 ("District Court"), dismissed Petitioner's Second Amended Complaint with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(6). Specifically, the District Court found that Petitioner failed to establish a *prima facie* claim in each of the two

remaining counts of the Second Amended Complaint.[1] The District Court's dismissal was with prejudice since Petitioner had been given two opportunities to amend his complaint in order to state a claim upon which relief could be granted, and the District Court found that further attempts to amend would be futile.

Petitioner appealed the dismissal with prejudice to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit Court of Appeals affirmed the District Court's dismissal. A subsequent Petition for Rehearing and Petition for Rehearing *En Banc* was denied *per curiam* by the Eleventh Circuit Court of Appeals.

At the outset, Petitioner contends that this writ should be granted to decide an important issue in job discrimination cases relating to an employer's ability to select criteria for employment decisions, and specifically relating to the legality of the performance standards set by Respondent. *Certiorari* should not be granted based on this argument, where if granted, the only issue properly before the Court is whether Petitioner's Second Amended Complaint was properly dismissed under Federal Rules of Civil Procedure 12(b)(6).

Petitioner next contends that Opinion affirming the District Court's dismissal with prejudice conflicts with decisions of the Eleventh Circuit. To the extent the decisions cited by Petitioner are even good law, and on point, they are not in conflict with the Opinion below.

---

1. Three counts of the Second Amended Complaint were voluntarily dismissed by Petitioner.

Petitioner's final contention, that the Eleventh Circuit's Opinion is a departure from the accepted course of judicial proceedings, is without support and without merit.

Simply put, Petitioner has failed completely to carry his burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

Procedural History

The Petitioner filed this action on August 11, 2005 against Respondent in the United States District Court, Southern District of Florida. Pet.App. at 9-10. The original six-count Complaint essentially alleged that Petitioner, as an at-will, hourly employee of Respondent was a "slave." Specifically, Petitioner alleged in Counts I, II and IV that he was subjected to involuntary servitude pursuant to 18 U.S.C. § 1584, that he was discharged without just cause, also pursuant to 18 U.S.C. § 1584, and that he was subject to peonage pursuant to 42 U.S.C. § 1994, respectively. (Petitioner also brought additional State claims). Pet.App. at 9-10.

Respondent moved to dismiss the Complaint, and by Order dated January 5, 2006, the District Court granted Respondent's Motion to Dismiss without prejudice on the grounds that Petitioner had failed to state a federal cause of action. On January 5, 2006 the Clerk for the U.S. District Court, Southern District of Florida administratively closed this case. Between

January 5, 2006 and January 4, 2007 this case remained closed with no activity in the matter. Pet.App. at 10.

On January 4, 2007 Petitioner served an Amended Complaint on Respondent. The Amended Complaint had three (3) counts. Count I, entitled "Deliberate Indifference," claimed that Respondent was liable to Petitioner under 42 U.S.C. § 1985(3) for violations of his rights under the Fifth and Thirteenth Amendments to the Constitution. Counts II and III were RICO claims under Florida Statutes §§ 772.103(3) & (4) Pet.App. at 10.

On July 19, 2007, the District Court again dismissed Petitioner's Amended Complaint without prejudice as Petitioner failed to state a cause upon which relief could be granted.

On August 9, 2007, Plaintiff filed a five (5) count Second Amended Complaint. Pet.Brief, Appendix D. Count I, entitled "Deliberate Indifference," claimed that Respondent was liable to Petitioner under 42 U.S.C. § 1985(3) for violations of his rights under the Fifth and Thirteenth Amendments to the Constitution. Pet.App. at 43-46. Counts II thru V, headed "Outrageous Conduct," "Breach of Contract," "Conspiracy," and "Wrongful Termination," respectively, alleged state law claims and also sought damages under 42 U.S.C. § 1985(3). Pet.App. at 46-49. Petitioner subsequently voluntarily dismissed Counts II, III and V; and on or about February 29, 2008, the District Court Judge entered an Order Dismissing the balance of Petitioner's Second Amended Complaint with prejudice. Pet.Brief, Appendix C.

On February 29, 2008 Petitioner filed an appeal to the Court of Appeals for the Eleventh Circuit. The Eleventh Circuit's Opinion affirmed the District Court's dismissal with prejudice of Petitioner's civil action after Petitioner had, after three attempts, failed to assert a valid claim under the law. Pet.Brief, Appendix B. The Opinion also affirmed the District Court's finding that given the factual scenario presented by Petitioner, he would not be able to state a valid cause of action by further amending the Complaint, thereby dismissing the action with prejudice. Pet.App. at 7-8.

Facts Relevant to the Petition- District Court Order

The District Court's Order contains the legal and factual grounds upon which the Order is based. According to the District Court, Counts I and IV, both brought under 42 U.S.C. § 1985, were lacking of essential elements under that statutory scheme. Pet.App. at 13-20. The District Court stated the elements of a cause of action under Section 1985(3) as:

- A conspiracy,
- For the purpose of depriving a person or class of persons of the equal protection of the laws, and
- An act in furtherance of the conspiracy
- Whereby a person is deprived of any right or privilege of a citizen of the United States. Pet.App. at 13.

The District Court held that Petitioner had failed to satisfy the second element. The District Court stated that since 42 U.S.C. § 1985(3) creates no substantive rights itself, Petitioner must assert a deprivation of rights under a specific statute or constitutional provision. Pet.App. at 14.

The District Court considered Petitioner's attempts to satisfy this requirement by alleging that his Fifth and Thirteenth Amendments rights were denied. The District Court held that neither of these amendments could support a valid claim; stating that the Fifth Amendment applies to a state actor, not a private corporation; and that the Thirteenth Amendment could not be invoked without allegations of physical restraint, physical injury or the threat of such restraint or injury through law or the legal process. Coercion does not extend to cases like this where an employee merely asserts that his will to quit has been subdued, but where he still has a choice. Pet.App. at 13-17.

The District Court found Petitioner failed to state a claim on a different ground, as well. Petitioner failed to allege some racial or otherwise class-based, invidiously discriminatory animus behind Respondent's actions. Pet.App. at 17-19. The District Court dismissed the Second Amended Complaint on these grounds. The dismissal was with prejudice because the District Court did not believe that given the factual scenario presented that Petitioner would be able to state a valid cause of action. Pet.App. at 19-20.

Facts Relevant to the Petition – Eleventh Circuit Opinion

Petitioner appealed the dismissal with prejudice of his 42 U.S.C. § 1985(3) civil complaint. Pet.App. at 3. He argued on appeal that he had satisfied the pleading requirements for his claims. The Appellate Court, reviewed the District Court's grant of the motion to dismiss *de novo*, and accepted the factual allegations in the Second Amended Complaint as true. The Appellate Court held that Petitioner failed to state a claim based on two pleading deficiencies; one, he failed to allege any racial or other discriminatory animus behind Respondent's actions, and two, he failed to assert a valid claim under the Thirteenth Amendment. Pet.App. at 6-7.

With respect to the first deficiency, the Eleventh Circuit Opinion specifically considered the findings of the District Court, paying close attention to the Petitioner's allegations as to non-black comparators and Respondent's motives. Pet.App. at 6. The Appellate Court found no error in the District Court's analysis regarding the lack of racial animus alleged. *Id.* With respect to the second deficiency, the Eleventh Circuit Opinion considered Petitioner's argument that Respondent's work standards are a 'badge of slavery' but specifically found that Petitioner failed to allege that Respondent forced him to work. Pet.App. at 6-7. Thus, the Eleventh Circuit held that Respondent's work standards could not "be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate." *Id.* Based on these findings, the Appellate Court affirmed the dismissal with prejudice of Petitioner's civil action.

REASONS FOR DENYING THE PETITION

The decision below does not amount to a departure from the accepted and usual course of judicial proceeding, it does not conflict with a decision of this Court or any Court of Appeals, nor does it implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. *Petitioner is unable to allege facts sufficient to support claims based on 42 U.S.C. § 1985*

The District Court set forth the proper standard to be applied on a motion to dismiss: it accepted the well pled facts as true and construed the complaint in the light most favorable to Petitioner. *Scheuer v. Rhodes*, 94 S.Ct. 1683, 416 U.S. 232 (1974). The District Court also properly held Petitioner to a less stringent standard based upon his *pro se* status. *Trawinski v. United Tech.*, 313 F.3d 1295, 1297 (11th Cir. 2002). Even with this lowered standard, the District Court found the Second Amended Complaint deficient. Pet.App. at 11-12, 19-20. Likewise, the Eleventh Circuit in its Opinion, followed existing law and reviewed the District Court's grant of the motion to dismiss *de novo*, and accepted the factual allegations in the complaint as true and in the light most favorable to Petitioner. *D.P. ex. Rel.E.P. v. Sch. Bd. of Broward County*, 483 F.3d 725, 728 (11th Cir. 2007); *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308 (11th Cir. 2000) (we review dismissal of a complaint for failure to state a claim *de novo*, construing all allegations as true and in the light most

favorable to the plaintiff). The Eleventh Circuit also recognized the less stringent standard to be applied to a *pro se* pleading. Pet.App. at 5.

Both the District Court, and the Eleventh Circuit applied the proper elements for a cause of a action under Section 1985(3):

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of person of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Trawinski, 313 F.3d at 1299 (citation omitted). Both Courts also properly recognized that pursuant to the Eleventh Circuit holding in *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624, 628 (11th Cir. 1992), Petitioner was required to allege some racial, or otherwise class-based, invidiously discriminatory animus behind Respondent's actions in order to meet the second element of a cause of action under § 1985(3).

Applying the appropriate standards of review and substantive law, both the District Court and the Appellate Court correctly found that Petitioner failed to state a claim for civil conspiracy under 42 U.S.C. § 1985(3) based on two sound legal bases. First, Petitioner did not allege a deprivation of equal protection under the laws; and second, Petitioner did

not allege any racial or other discriminatory animus on the part of Respondent.

The District Court in its Order of Dismissal found that after three attempts Petitioner was yet to assert a valid claim under the law. Pet.App. at 19-20. The District Court further found that "it does not appear that given the factual scenario presented by Plaintiff, that Plaintiff is able to state a valid cause of action by amending the complaint, and thus Plaintiff's action is due to be dismissed with prejudice." *Id.* The District Court properly concluded that further amendment by Petitioner would be futile, thereby dismissing with prejudice. The Eleventh Circuit properly reviewed the denial of leave to amend for abuse of discretion, and found no abuse of discretion. *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1270 (11th Cir. 2001). Accordingly, the Eleventh Circuit properly affirmed the District Court's dismissal with prejudice pursuant to Federal Rules of Civil Procedure Rule 12(b)(6). Pet.App. at 8.

II. *The Eleventh Circuit Opinions cited by Petitioner have no impact on this case*

Petitioner contends that the Eleventh Circuit's *per curiam* Opinion conflicts with certain decisions of the Eleventh Circuit cited in his Brief. To the extent the decisions cited by Petitioner are even good law, and are on point, they are not in conflict with the Opinion below in this matter. Petitioner argues first that the Opinion below is not consistent with the decision in *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000). Pet.Brief, p.6. Petitioner's argument is unclear, but he appears to cite *Chapman* to bolster his claim that this Court must

accept his Petition to "decide some important issues... in job discrimination cases." Petitioner's reliance on *Chapman* is misplaced.

The plaintiff in *Chapman* brought an action for age discrimination and disability discrimination. The district court granted summary judgment in favor of the defendants on the age claims, and a jury returned a verdict in favor of the defendants after a trial on the disability claims. A panel of the Eleventh Circuit affirmed in part, and reversed in part. The Eleventh Circuit then granted a rehearing *en banc* to decide issues having to do with an employer's ability to use subjective criteria in employment decisions. The *Chapman* court determined that a subjective reason can constitute a legally sufficient, legitimate non-discriminatory reason for an employment decision. This is not inconsistent with the Opinion here, which turned solely on Petitioner's failure to state a claim, and as such has no bearing on Petitioner's writ.

The decision of *Wagner v. Daewoo Heavy Industries America Corp.*, 289 F.3d 1268 (11th Cir. 2002), cited by Petitioner, is equally inapposite where the panel's decision in that case has been vacated. *See Wagner v. Daewoo Heavy Industries America Corp.*, 298 F.3d 1228 (11th Cir. 2002).

The third decision cited by Petitioner is *Arnold v. Board of Education of Escambia County, Alabama*, 880 F.2d 305 (11th Cir. 1989). Petitioner argues an inconsistent result here, where the court in *Arnold* allowed several amendments to the complaint and discovery to be conducted. Pet.Brief, p.7. Here, Petitioner was given

several opportunities to amend his pleading before the District Court determined further amendment was futile. In any event, *Arnold* has been overruled, at least in part. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

III. *If granted, the only issue properly before this Court is whether Petitioner's claims were properly dismissed*

Petitioner contends that this writ should be granted to decide an important issue in job discrimination cases, to wit, "an employer's ability to select its own criteria for making employment decisions and with the permissibility of using subjective criteria." Pet.Brief, p.5. Stated differently, Petitioner contends the issue on this Petition is whether Respondent violated his constitutional rights when he was terminated for failing to meet Respondent's performance standards. Petitioner has misstated what issues properly would be before the Court if *certiorari* were granted. Even if Petitioner's writ were accepted, the only issue properly before this Court would be whether Petitioner's Second Amended Complaint was properly dismissed under Federal Rules of Civil Procedure 12(b)(6). The Opinion does not implicate an important question of federal law that has not been settled, and this case bears no impact for anyone other than the present litigants. For these reasons, the writ should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

ALAN D. DANZ
AMY L. KRONENGOLD
ARIANNE B. SUAREZ*
LIEBERMAN DANZ
& KRONENGOLD, PL
1301 International Parkway
Suite 140
Fort Lauderdale, FL 33323
(954) 385-5400

Counsel for Respondent

* *Counsel of Record*